

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

SB 518 (Wieckowski)
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MEC

SUBJECT

Public records: disclosure: court costs and attorney's fees

DIGEST

This bill clarifies that notwithstanding Code of Civil Procedure Section 998, the court must award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation under the California Public Records Act.

EXECUTIVE SUMMARY

Existing law provides that when it appears to a superior court that certain public records are being improperly withheld from a member of the public, the California Public Records Act (CPRA) requires the court to order the officer or person charged with withholding the records to disclose the public record or show cause why they should not do so. The CPRA requires the court to award court costs and reasonable attorney's fees to the requester if the requester prevails in litigation filed pursuant to these provisions. On the other hand, the CPRA requires the court to award court costs and reasonable attorney's fees to the public agency only in the situation where the court finds that the requester's case is clearly frivolous. This high standard for the public agency to meet is clearly written into the CPRA. Indeed the CPRA was designed with the balance tilted toward sunshine into public records. The intent of the CPRA's fee-shifting provision is to provide "protection... for members of the public" seeking public records and it is intentionally asymmetrical. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427.) If Section 998 offers to compromise were allowed to be utilized by public agencies where public records are requested, the intentionally asymmetrical aspect of the CPRA's fee-shifting provisions would be thwarted and the CPRA would be undermined. Because the author received reports that 998 offers are being utilized by some public agencies, the author introduced this measure to make clear that 998 offers shall not have any impact on the determination of attorney's fees and costs in CPRA actions, thus preserving the spirit of the CPRA.

This bill is author-sponsored and supported by the California Employment Lawyers Association. It is opposed by a coalition of organizations that represent public agencies.

PROPOSED CHANGES TO THE LAW

Existing law:

1. The California Constitution declares the people's right to transparency in government. ("The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny....") (Cal. Const., art. I, § 3.)
2. The CPRA governs the disclosure of information collected and maintained by public agencies. (Gov. Code § 6250 et seq.) Generally, all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 6254.) There are 30 general categories of documents or information that are exempt from disclosure, essentially due to the character of the information.
3. For purposes of the CPRA, defines "public agency" as any state or local agency; "state agency" to include every state office, officer, department, division, bureau, board, and commission or other state body or agency, except for the Legislature and the judiciary; and "person" to include any natural person, corporation, partnership, limited liability company, firm, or, association. (Gov. Code § 6252(c),(d)&(f).)
4. Provides that except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, is required to make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. (Gov. Code § 6253(b).)
5. Requires each agency, upon a request for a copy of records and within 10 days from receipt of the request, to determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and requires the agency to promptly notify the person making the request of the determination and the reasons therefore. (Gov. Code § 6253(c).)
6. Provides that in unusual circumstances, as defined, the 10-day time limit may be extended by written notice from the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension of more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. (Gov. Code § 6253(c).)

7. Prohibits construing the CPRA to permit an agency to delay or obstruct the inspection or copying of public records. (Gov. Code § 6253(d).)
8. Provides that the agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA or, that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code § 6255(a).)
9. Provides that a response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing. (Gov. Code § 6255(b).)
10. Provides that any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under the CPRA. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge with the object of securing a decision as to these matters at the earliest possible time. (Gov. Code § 6258.)
11. Provides that whenever it is made to appear by verified petition to the superior court of the county where the records, or some part thereof, are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why they should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow. (Gov. Code § 6259(a).)
12. Provides that if the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, they shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, they shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. (Gov. Code § 6259(b).)
13. Provides that in an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition

within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why they are not in contempt of court. (Gov. Code § 6259(c).)

14. Provides that the court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency. (Gov. Code § 6259(d).)
15. Provides for Section 998 Offers to Compromise, a litigation tool to encourage settlement. If the 998 settlement offer is rejected, the party that made the offer is entitled to recover litigation costs, as specified, if the party that rejected the offer fails to obtain a better result at trial. (Civ. Proc. Code § 998.)

This bill provides that notwithstanding Section 998 of the Code of Civil Procedure, the court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the requester's case is clearly frivolous, it shall award court costs and reasonable attorney's fees to the public agency.

COMMENTS

1. The CPRA was enacted to ensure that the public knows the public's business

The intent of the CPRA's fee-shifting provision is to provide "protection... for members of the public" seeking public records and it is intentionally asymmetrical. (*Filarsky*, 28 Cal.4th at 427.) Fees are mandatory for a successful requester, but they can be awarded to a prevailing public entity only if the requester's claim was clearly frivolous. "If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency." (Gov. Code, § 6259, subd. (d).)

The plain language of the CPRA's fee-shifting provision, Section 6259(d), makes clear that the only circumstance in which the government may recover fees is when a records requester files a clearly frivolous lawsuit. Thus, Section 6259(d) simply does not contemplate government agencies as plaintiffs entitled to fee recovery.

Indeed, with regard to a public agency's ability to recover attorney fees and court costs, current law provides that a court "shall award court costs and reasonable attorney fees to the public agency" "[i]f the court finds that the plaintiff's case is clearly frivolous". (Gov. Code § 6259(d).) However, with regard to a public agency having to pay court costs and attorney fees, the statute reads: "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." (Gov. Code § 6259 (d).)

An interpretation of Government Code Section 6259(d) that would allow a public agency to recover attorney fees and court costs from a requester of public documents outside of the very unsympathetic circumstance where a court finds a requester's case is "clearly frivolous," would arguably deter the public from requesting public documents because of fear. Such an interpretation runs counter to the provision in the California Constitution that provides that the "people have the right of access to information concerning the conduct of the people's business, and therefore... the writings of public officials and agencies shall be open to public scrutiny..." and the provision in the CPRA that provides that in "enacting the CPRA, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 6250.)

Offers to compromise made under California Code of Civil Procedure Section 998 are a litigation tool to encourage settlement. If the 998 settlement offer is rejected, the party that made the offer is entitled to recover litigation costs if the party that rejected the offer fails to obtain a better result at trial.

2. Code of Civil Procedure Section 998 is in direct conflict with the CPRA

The Code of Civil Procedure Section 998 settlement scheme is in extreme conflict with the CPRA. Allowing public agencies to use 998 offers in CPRA disputes would push those who are requesting public records, pursuant to their constitutional rights, into accepting settlements out of fear of being liable for the public agencies' attorney's fees. The Legislature crafted the CPRA to only allow attorney's fees and court costs to be awarded to public agencies if the court finds the request was clearly frivolous.

The National Lawyers Guild, a supporter of the bill, explains that the "CPRA ensures the fundamental right of every person to inspect and to obtain copies of any public record. The right to have state and local agencies comply with the CPRA is so important that it is also guaranteed by the State Constitution at Article I, Section 3."

The California Employment Lawyers Association, in support, writes:

Because CPRA petitions are filed by people seeking to enforce their fundamental right to access records, the courts and the legislature have carefully and thoroughly restricted the circumstances under which respondents

can recover their fees and costs from requesters. The law as it now stands disallows fee recovery by a prevailing agency unless the litigation is “clearly frivolous.” The use of 998 offers in CPRA petitions undermines this essential element of the law by conceivably allowing public agencies to recover fees from requesters even if the requester is the prevailing party.

Section 998 offers are an important tool in getting parties to settle in certain cases, however they are not appropriate in CPRA cases. The use of 998 offers by public agencies in CPRA litigation may unduly force petitioners into accepting settlements that include very limited record production out of concern that they will otherwise be liable for respondents’ attorney’s fees.

The Coalition for Sensible Public Records Access explains the following in support of the bill:

[A]s a matter of public policy, [Section 998 offers] were intended to encourage settlement before trial in civil suits. Applying them to public records matters is inappropriate. The damages are to public trust and accountability flowing from the records being withheld from public scrutiny.

3. Section 998 offers in CPRA actions undermine the CPRA

According to the author, section 998 offers “are an important tool in getting parties to settle in certain cases, however they do not work in CPRA cases.” The author highlights *Dunes Development v. California Coastal Commission* as an example. According to the author:

Dunes Development requested public documents from the California Coastal Commission which the agency refused to release. Dunes Development took the Commission to court to retrieve the requested documents. The Coastal Commission made a [section] 998 offer of \$10,000, along with a proposal that it release some of the documents requested. Dunes Development rejected the offer and the Coastal Commission offered a second [section] 998, which again proposed release of only some of the documents requested and \$30,000. Dunes Development refused again. [section] 998 offers were never intended to be used by the government to prevent disclosable documents from being withheld to the public.

The author further asserts:

It is the fundamental right of every Californian to inspect identifiable and disclosable records held by their government. The California Public Records Act established this transparency and accountability which is essential to functioning democracy. Unfortunately, public agencies are using 998 offers in court to prevent the release of disclosable documents. To make matters worse,

998 offers can shift court costs onto the requestor. This undermines the CPRA which requires the requester to have their court costs covered if they prevail. My bill will ensure that the CPRA is being used as it was intended: as a way for Californians to get information from their government without fear of being burdened by court fees.

The California Special Districts Association, League of California Cities, California State Association of Counties, California Downtown Association, Rural County Representatives of California, Urban Counties of California, and Association of California Healthcare Districts write the following in opposition to the bill:

Failure of a public agency to disclose records pursuant to the CPRA can result in significant financial consequences for the agency from potential litigation.

[. . .]

Under current law, records requesters that believe a public agency has improperly withheld a record may sue the agency immediately. There is no “meet and confer” requirement that a requester work with an agency to resolve a dispute over any records that may have been withheld by an agency. Additionally, should a requestor prevail in court by having even a single record released that had previously been withheld, the CPRA mandates that a court award costs and reasonable attorney fees to the plaintiff. Offers to compromise made under Code of Civil Procedure section 998 (“Section 998 offers”) are intended to encourage litigants to settle their disputes in an amicable and reasonable fashion and avoid excessive litigation costs.

[. . .]

Proposing to eliminate this common litigation practice would discourage plaintiffs’ attorneys in CPRA cases from settling because they would face no consequence for rejecting a reasonable and fair Section 998 offer, but potentially significantly more to gain in fees by proceeding with a costly litigation process, even if an attorney’s client receives no additional benefit other than what would have been offered in a settlement. SB 518 creates a lopsided benefit to plaintiff attorneys over public agencies that encourages costly litigation, when a simple agreement could be reached.

The California News Publishers Association (CNPA) “does not believe 998 offers apply to an attorney’s fee award under the CPRA.” However, public agencies, according to the CNPA, “have used 998 offers to scare requesters into prematurely settling legitimate CPRA disputes out of fear that if they do not, the court may not award them attorney’s fees and costs.” The CNPA refers to this as a “nefarious tactic” that “is contrary to the fundamental premise of the CPRA and Article I, Section 3 of the California Constitution.” Given that the clear design of the attorney’s fees and costs of the CPRA

is to promote the release of records and ensure that the public does not shy away from public records requests, 998 offers would undermine the CPRA and arguably should not be allowed to have an effect on a requester's ability to recover attorney's fees in an action under the CPRA.

SUPPORT

California Employment Lawyers Association
California News Publishers Association
Coalition for Sensible Public Records Access
First Amendment Coalition
Jeffer Mangels Butler & Mitchell LLP
National Lawyers Guild
Oakland Privacy

OPPOSITION

Association of California Healthcare Districts
California Downtown Association
California Special Districts Association
California State Association of Counties
League of California Cities
Rural County Representatives of California
Urban Counties of California

RELATED LEGISLATION

Pending Legislation: SB 749 (Durazo, 2019) provides that all information in a public contract between a private industry employer and a state or local agency pertaining to job creation, job quality, and job retention, as well as Buy America laws compliance, is not exempted from the CPRA as a trade secret. This scheduled for hearing in the Senate Committee on Judiciary.

Prior Legislation: SB 1244 (Wieckowski, Ch. 463, Stats. 2018) Replaced the term "plaintiff" with the term "requester" in Government Code Section 6259(d) to clarify that the court shall award court costs and reasonable attorney fees to the requester should the requester prevail in litigation filed pursuant to the Public Records Act and to clarify that the court shall award court costs and reasonable attorney fees to the public agency if the court finds that the requester's case is clearly frivolous.
